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No. 93-939

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY MCGINNIS, ET AL., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioners did not establish "good cause" under Fed. R. Civ. P. 4(j) for their failure to serve their summonses and complaints within 120 days after they filed their complaints.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 2 F.3d 548. The opinions of the district court (Pet. App. A16-A20, A34-A36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. A37-A38. The petition for a writ of certiorari was filed on December 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who were represented by the same counsel, commenced two separate suits against the Secretary of Health and Human Services seeking review of the Secretary's denial of their claims for disability benefits. Petitioner Roy McGinnis's complaint was filed on July 5, 1991; petitioner Peggy Musmeci's complaint was filed on July 17, 1991. Pet. App. A2.

Petitioners' counsel sent copies of the summonses and complaints by certified mail to the United States Attorney in New Orleans, the Attorney General, and the Secretary of Health and Human Services. The United States Attorney received petitioner McGinnis's complaint on or about July 16, 1991, and petitioner Musmeci's on or about July 23, 1991. Shortly thereafter, the United States Attorney notified petitioners by letter that their attempted service was ineffective under Rule 4 of the Federal Rules of Civil Procedure, and that he would not file an answer or other pleading until properly served. Pet. App. A2-A3.

On October 21, 1991, still within the 120-day period prescribed by Fed. R. Civ. P. 4(j) for service of process, petitioners' counsel caused summonses to be reissued in both cases. It was not until December 9, 1991, however, well beyond the 120-day period, that counsel properly served the United States Attorney. Pet. App. A3. Meanwhile, on December 4, 1991, the Secretary moved to dismiss petitioners' cases on the ground that service had not been effected within 120 days, as required by Rule 4(j). Pet. App. A3.

2. The district court granted the Secretary's motions to dismiss. Pet. App. A16-A20, A34-A36. In petitioner McGinnis's case, the district court noted that the summons and complaint had been improperly served within

the 120-day period required by Rule 4(j) because petitioner had not delivered them to the United States Attorney within that time period. *Id.* at A17. The court then held that dismissal of McGinnis's complaint was "required in the absence of a showing of good cause why proper service was not made." *Id.* at A17-A18. Finding that petitioner's "failure to properly serve [respondent] is attributable solely to his own neglect," that petitioner's proffered excuses were without merit, and that petitioner "had every opportunity to perfect service * * * but failed to do so due to his own negligence," the court concluded that petitioner had failed to establish good cause and accordingly granted respondent's motion to dismiss. *Id.* at A18-A19.

In petitioner Musmeci's case, the district court noted that "[s]imple inadvertence usually does not suffice" to establish "good cause" for a party's failure to effect proper service within the 120-day period prescribed by Rule 4(j). Pet. App. A35. Finding that "[t]here has been no reasonable basis for [petitioner's] noncompliance [with Rule 4(j)] demonstrated other than a clerical error," the court concluded that "good cause has not been demonstrated." *Ibid.* Accordingly, the court dismissed petitioner's complaint.

3. The court of appeals affirmed. Pet. App. A1-A8. The court held that, for purposes of Rule 4(j), "good cause 'would appear to require *at least* as much as would be required to show excusable neglect,'" and that "[a]ctions falling into the category of inadvertence, mistake or ignorance of counsel * * * do not establish good cause for extending the 120 day period for service." Pet. App. A5.[1] The court noted that petitioners' counsel

[1] The court of appeals rejected petitioners' reliance on *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct.

"learned that his initial efforts at service of process were defective soon after the United States Attorney received the complaints and summons," yet "he waited months before he had the summons reissued" and even then failed to effect service within the three weeks that remained. *Id.* at A6. The court concluded that the fact that petitioners' counsel "had instructed his secretary to serve the papers upon the United States Attorney * * * is surely not good cause or (even) excusable neglect." *Ibid.*

The court of appeals also found unpersuasive petitioners' arguments that the government had actual notice of the suits and that petitioners' suits are now barred by virtue of the applicable statute of limitations. The court explained that the absence of prejudice to the government and the existence of prejudice to petitioners were not dispositive, because "Rule 4(j) requires service to be timely made unless good cause for the delay is shown." Pet. App. A6. Finally, the court rejected petitioners' argument that the government had waived the requirements of Rule 4(j). The court held that the government had no obligation to file an answer or a motion to dismiss raising the service defect prior to expiration of the 120-day period. Moreover, the court observed that the United States Attorney had promptly notified petitioners by letter of both the defect in service and the government's unwillingness to waive that defect. *Id.* at A7.

1489 (1993), which involved the meaning of the phrase "excusable neglect" as used in Bankruptcy Rule 9006(b)(1). The court explained that *Pioneer* "does not alter our analysis" because the mode of analysis appropriate to [Bankruptcy] Rule 9006(b)(1) is not necessarily appropriate to Rule 4(j) if only because the standard articulated in Rule 4(j) is good cause, not *excusable neglect*." Pet. App. A5 n.1.

ARGUMENT

1. Petitioners contend (Pet. 5-10) that the decision of the court of appeals is inconsistent with this Court's decision in *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993). In *Pioneer*, the Court held that Bankruptcy Rule 9006(b)(1), which permits late filings in cases of "excusable neglect," authorizes such filings in some cases where the lateness is "caused by inadvertence, mistake, or carelessness." 113 S. Ct. at 1495. That holding was based on several factors: the "ordinary meaning of 'neglect'" (*id.* at 1494); "the policies underlying Chapter 11 [of the Bankruptcy Code] and the bankruptcy rules" (*id.* at 1495); "[t]he history of the present bankruptcy rules" (*ibid.*); and the meaning of the phrase "excusable neglect" as used in the Federal Rules of Civil Procedure (*id.* at 1496-1498).

As the court of appeals held (Pet. App. A5 n.1), *Pioneer* has no application in this case. The requisite showing under Rule 4(j) is "good cause," not "excusable neglect." Thus, the Court's analysis in *Pioneer*, which was founded upon the meaning and usage of the particular phrase at issue in that case, sheds no light upon the meaning of Rule 4(j), and the court of appeals properly declined to apply *Pioneer* in this case.[2]

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[2] Petitioners contend (Pet. 8) that *Pioneer* is relevant to this case because Fed. R. Civ. P. 6(b)(2) permits district courts to extend the time in which a party is required to act "where the failure to act was the result of excusable neglect." As petitioners concede (Pet. 8), however, they "did not file a motion to enlarge the time for service under" Rule 6(b)(2). Such a motion is a prerequisite to the court's ability to grant such an enlargement of time. See Fed. R. Civ. P. 6(b)(2) (once applicable time period has expired, court may act only "upon motion"). Moreover, because petitioners failed to seek relief under Rule 6(b) in the district court, neither that court nor the court of appeals had occasion to address

2. Petitioners also contend (Pet. 10-24) that review by this Court is warranted because the courts of appeals are divided over the meaning of the phrase "good cause" as used in Rule 4(j). According to petitioners (Pet. 12), the Second, Fourth, and Ninth Circuits have adopted "more lenient" criteria than those utilized by other courts in determining what constitutes "good cause." That contention is incorrect.

As the Seventh Circuit observed in *Geiger* v. *Allen*, 850 F.2d 330 (1988), "[c]ourts that have considered this issue * * * *agree* that counsel's inadvertent failure to serve a defendant within the statutory period does not constitute good cause. Likewise, half-hearted efforts to serve a defendant will not excuse a plaintiff from adhering to the 120-day deadline." 850 F.2d at 333 (emphasis added; citations omitted). None of the court of appeals decisions cited by petitioners is to the contrary.

The Fourth Circuit's decision in *Vorhees* v. *Fischer & Krecke*, 697 F.2d 574 (1983), has nothing to do with the meaning of "good cause." In that case, service on a West German defendant had not been made in accordance with a treaty that superseded the requirements of Fed. R. Civ. P. 4. The court of appeals held that the plaintiffs' case should not have been dismissed until they were given a reasonable opportunity to effect service in accor-

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this issue, and thus it is not properly before this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Petitioners also claim (Pet. 9) that the standard for excusable neglect set forth in *Pioneer* should govern this case because the court of appeals "has said that in determining what is good cause in [Rule] 4(j) it is at least excusable neglect." Neither the court of appeals nor this Court, however, has suggested that the meaning of the phrase "good cause" as used in Rule 4(j) is to be determined by reference to the phrase "excusable neglect" as used in Bankruptcy Rule 9006(b)(1). Petitioners' contention is therefore without merit.

dance with the treaty. 697 F.2d at 576. The court had no occasion to address the question at issue in this case.

In *Zankel* v. *United States*, 921 F.2d 432 (2d Cir. 1990), the court observed that "a judge is certainly not required to treat inadvertence or ignorance of the Rules as 'good cause' or 'excusable neglect' for delay in service," and that in such cases dismissal under Rule 4(j) ordinarily would be proper. 921 F.2d at 436. The court found, however, that "the circumstances of this case are not ordinary" (*ibid.*), because "[a]lthough plaintiffs attempted to obtain clarification of the problem, the government did not disclose the specific character of plaintiffs' defective service until * * * 14 months after the suit was commenced," and indeed the government arguably "lulled plaintiffs into believing that their [initial attempt at service] constituted satisfactory service" (*id.* at 437). In this case, by contrast, the government informed petitioners of the service defect well within the 120-day period. Pet. App. A2-A3. Thus, this case presents the "ordinary" circumstance of inadvertence identified in *Zankel*, and dismissal was entirely appropriate even under the Second Circuit's analysis.

The Ninth Circuit cases cited by petitioners also are entirely consistent with the decision below. In *Hart* v. *United States*, 817 F.2d 78 (9th Cir. 1987) (per curiam), for example, the court rejected the plaintiffs' claim that "secretarial misdeeds" constituted good cause. 817 F.2d at 81. The court held that "[s]ecretarial negligence, if it exists, is chargeable to counsel," and that "these claims at best resolve to inadvertent error, which is not good cause." *Ibid.* Similarly, in *Wei* v. *Hawaii*, 763 F.2d 370 (9th Cir. 1985) (per curiam), the court held that "[t]he inadvertence of [plaintiff's] counsel * * * does not qualify as good cause for * * * failure to comply with Rule 4(j)." 763 F.2d at 372.

Finally, in *Whale* v. *United States*, 792 F.2d 951 (9th Cir. 1986), the plaintiff's failure to effect proper service was due to his attorney's mistaken belief that he could serve the United States Attorney by mail. The Ninth Circuit held that "counsel's belief that service on the U.S. Attorney by certified mail satisfied the requirements of Rule 4 does not constitute justifiable excuse." 792 F.2d at 954. The court distinguished its prior decision in *Borzeka* v. *Heckler*, 739 F.2d 444 (9th Cir. 1984), explaining that that case involved a "pro se plaintiff [who] alleged that he received erroneous information from the district court regarding service on [the] U.S. Attorney." 792 F.2d at 953. Like the plaintiff in *Whale*, and unlike the plaintiff in *Borzeka*, petitioners were represented by counsel and were not misled by the United States Attorney or the district court. Accordingly, dismissal was appropriate under the Ninth Circuit's test as well, and thus there is no conflict.

3. Petitioners also contend (Pet. 24) that they demonstrated "good cause" because "[t]he attempts taken by [their] counsel to effect service on the local United States Attorney were reasonable and constituted due diligence." That fact-bound contention does not warrant review. In any event, in view of the unjustifiable failure of petitioners' counsel to effect service upon the United States Attorney even after receiving ample notice of the service defect from the U.S. Attorney's Office, the court of appeals correctly held that the district court did not abuse its discretion in finding that petitioners failed to demonstrate "good cause."[3]

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[3] We note that, after entry of judgment in the court of appeals, Fed. R. Civ. P. 4 was amended to authorize service of process on United States Attorneys by certified mail and to give district courts discretion to excuse service defects even in the absence of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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good cause. See Fed. R. Civ. P. 4(i)(1)(A) and (m) (eff. Dec. 1, 1993), *reprinted at* 113 S. Ct. *622*, *630* (1993); see also Notes of the Advisory Committee on Rules, 113 S. Ct. *644* (1993) (new Rule 4(i)(1)(A) "amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail"); *id.* at *647* (new Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of [failing to effect service within 120 days] * * * even if there is no good cause shown"). Petitioners do not contend that they are entitled to benefit from the more lenient provisions of the amended Rule, and thus there is no occasion for this Court to address the question whether this amendment to Rule 4 has retroactive application. See Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court".). The amendments to Rule 4 do, however, constitute additional factors weighing against review of this pre-amendment case.